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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo. 2000.

STATEMENT OF FACTS

On February 25, 1997 Robert and Elaine Price entered into a contract of employment with the Joel B. Eisenstein Law Firm. Respondent is the son-in-law and worked for Mr. Eisenstein. Elaine Price, against her husband's wishes underwent an abortion procedure which resulted in personal injuries. Two years later, Respondent filed a Petition for those injuries to Mrs. Price and for loss of consortium for Mr. Price.

Mr. Price "was aggravated at the whole thing, that my wife had an abortion, that I was out to get an abortion doctor, I think I would rather see him lose his license." (A16). But on the other hand, Mr. Price provided Respondent with copies of cases wherein six-figure sums had been awarded. (A16).

Respondent discussed "the pluses and minuses of the case" with them and why he did not believe the case was "worth that high dollar amount." (A18).

On September 27, 1999, a settlement conference was held in the St. Louis County Courthouse.

After some back-and-forth negotiations between the parties, in which Respondent was given authority by both clients to settle the cases for $75,000 and then $60,000, the defendants offered $50,000 saying "...they're not going to offer anymore than that". (A17).

Respondent discussed this final offer of $50,000 to settle the cases with both parties including what the bottom line would be after expenses and his reduced attorney fees. (A20).

Mrs. Price wanted to accept this offer for settlement but Mr. Price then decided he "didn't want to be any part of this, I want to be dismissed out, I want out of this lawsuit" (A20). "...I realized that Dr. Palmer has insurance, insurance is going to settle the situation, and what happened, nothing is going to change, and I guess I was insulted that somebody would say that you could rectify your feelings with money." (A22). Although he had agreed to jointly settle for $60,000 he subsequently wanted out of the case when his wife was going to settle for $50,000.

At Mr. Price's request, Respondent sought to have him dismissed from the case without prejudice yet settle the case for Mrs. Price as per her request.

The defense counsel refused this request, "Joe, this is a package deal, we need a joint dismissal by both of them without prejudice or it is not settled."(A23).

Respondent told both Mr. & Mrs. Price that the insurance company would not dismiss Mr. Price, that it had to be a joint settlement, he had to remain in the case for there to be a settlement. (A23, 24). Mr. Price said "that's fine its her decision anyhow, that's fine." (A23).

Both Respondent and Mr. Price agree that Respondent informed both Mr. and Mrs. Price of this requirement for settlement and further both agree that Mr. Price left the final decision up to Mr. Price, "it's her case." (A24; A28).

Respondent believed that Mr. Price, although not happy with the final $50,000 figure was "agreeing to stay in the case to get the case resolved for his wife, saying "this is her lawsuit." (A25). Further Respondent testified that after attempting to allow Mr. Price to withdraw without success he "came back and told him we couldn't do that, if he still wanted that, there was no settlement today for his wife, he told me that's fine, I'll stay and get the case done." (A35).

Respondent then joined defense counsel in the signing memo of settlement with the court.

Respondent further explained to Mr. & Mrs. Price that he would soon thereafter receive the release, dismissal documents and the check in the mail and that both of them would need to come to his office upon being called to sign these documents. (A26).

As was the office practice, the three documents were left with the secretary/receptionist to give to clients for review and signatures. After clients endorse the checks, they are then deposited into the law firm account before checks

are sent to the clients for their share. Respondent saw only the insurance settlement check with both endorsements and the release document with both signatures affixed. (A52).

Respondent has always said he was not in the office, did not see either of the clients, nor did he explain the terms or witness their signatures on November 2, 1999. Respondent has always admitted that he signed the release and settlement document which says "the foregoing was signed by Elaine Price and Robert Price of their own free will and volition in my presence" when in fact neither of them had signed in his presence.

Respondent in retrospect became aware the release that he signed did provide that he had reviewed the terms with the Price's and that he was present when they signed. (A30). Respondent testified he had never seen a release with that language. (A27).

Respondent signed page 4 of the release and settlement stating that he had reviewed the terms and that the clients signed in his presence when in fact they did not, unintentionally and admits it was his "screw up" and as soon as he became aware that he had done so, he changed his office procedures to assure it won't happen again. (A30).

This release and settlement document was not filed with the court.

What was filed with the trial court on November 8, 1999 was the stipulation for dismissal which was signed along with the release and settlement document as well as the insurance company check made payable to the clients and the law firm. Respondent also did not see either of these documents signed by the clients and these documents did not contain language that they were signed in his presence.

On November 12, 1999, Respondent wrote a closing letter and mailed the settlement check to Mrs. Price who deposited same in the joint account of Mr. and Mrs. Price. (A21).

Some four months later on March 14, 2000, Respondent received a letter of complaint from Mr. Price stating he did not sign the documents including any check. This was the first Respondent was informed of Mr. Price not being personally present in his office when the settlement check, release and settlement and stipulation for dismissal were purportedly signed by both Mr. and Mrs. Price.

Upon receiving Mr. Price's letter, Respondent immediately pulled his file, reviewed the signatures, replied in writing and called Mr. and Mrs. Price concerning the allegation that Mr. Price did not sign these documents.(A31).He talked with his secretary and the receptionist but was unable to determine which staff was present when the Price documents were signed. As far as he was concerned, Mr. Price had agreed to proceed with Mrs. Price's desire to settle the case for

$50,000...because that's what Mrs. Price wanted. Since Mr. Price's desire to withdraw from the case could not be accomplished if the settlement was to go forward and Mrs. Price wanted to settle the case the decision was made by both Mr. and Mrs. Price to finalize the settlement. Respondent was never aware that Mr. Price had not signed all the documents in his office yet the law office settlement check for $34,729.56 was deposited into the joint account of Mr. and Mrs. Price on November 12, 1999.

The bottom line is that Respondent has always acknowledged that he negligently, unintentionally and falsely signed the "release and settlement" because he did not see the parties sign this document in his presence nor explain the terms to them.

This rule violation is the only violation and it is also all that the local committee and the panel has concluded that he violated contrary to the Informant's persistent attempts to prove otherwise, in the initial stipulation to this Honorable Court, before the panel and now once again before this Honorable Court on trial de novo.

In July, 2001 some twenty months after the settlement check was deposited in the joint account of Mr. Price and his now former wife, Elaine Price Neal, Mr. Price filed a bar complaint against Respondent.

The matter was referred to the Region X Disciplinary Committee which conducted an investigation and on November 13, 2002 the committee completed its investigation and dismissed the complaint. However, the committee advised Respondent that it determined that it did indeed believe that he was aware that Mrs. Price forged Mr. Price's signature on the settlement check or that he actually instructed her to do so. The committee requested that Respondent refrain from such conduct in the future. The disciplinary panel after full hearing found no such finding that he was aware of or instructed a forgery, only that "he knew or should have known" that Mr. Price did not, in fact, execute the document. (A55).

One month later, after being notified that his complaint had been dismissed in December of 2002, Mr. Price requested the advisory committee review his complaint.

Almost one year thereafter on October 31, 2003, Informant after investigation and review wrote Respondent that before filing an Information wanted to "ascertain whether you would be willing to stipulate to a public reprimand." (A3).

The proposed Information alleged Respondent had committed professional misconduct as a result of violating three rules rather than one heretofore. (A5-6).

Respondent, always has agreed that he violated Rule 4-8.4(c) by signing a document attesting that he explained the terms and was present when the clients signed the Release and Settlement document when in fact he was not.

Although Respondent agreed to the public reprimand, he did not want to admit the other two alleged violations which he denied. (A7).

For these alleged three violations Informant, even with knowledge of Respondent's prior admonition some eleven years ago, believed the recommended public reprimand was appropriate for these three violations.

Respondent did not then and does not now believe he violated Rule 4-1.2(a) by not abiding by Mr. Price's decision to have his name withdrawn as a plaintiff in the lawsuit. (Neither did the panel so find). (A47).

Nor did he then and does not now believe he violated Rule 4-1.7(b) by continuing to represent both Mr. and Mrs. Price as alleged. (Neither did the panel so find). (A47).

Even so, Informant persisted with their recommendation for public reprimand for all three alleged rule violations upon seeking leave of this Honorable Court to file an Information and Stipulation. (A8-12).

In this stipulation, Informant persisted in alleging paragraphs 9 and 10 of the Information to the two alleged rule violations to which Respondent did not admit. (A8).

This Honorable Court, quite understandingly so, rejected the proposed discipline for the one admitted rule violation and the two denied rule violations. (A 13).

Shortly thereafter Informant filed an Information alleging once again all three rules violations.

The disciplinary hearing panel after hearing testimony from both Mr. Price and Respondent, issued its decision on July 19, 2005.

The panel concluded and agreed with Respondent's consistent position that he had violated Rule 4-8.4(c) but did not violate either Rule 4-1.2(a) or Rule 4-1.7(6). (A47).

At the hearing before the panel, Informant argued

> "that at the minimum, we have here a public reprimand case. I would suggest to the panel that the 1.2(a) rule violation and the 1.7(b) rule violation, up the ante to the suspension level of sanction. I'm not suggesting any long-term,

> I'm suggesting something shorter than six months, which under the amendment to the reinstatement rule as of the first of the year, provides a lawyer who

> has been suspended sanction for a period of less than six months, an opportunity to apply for reinstatement." (A37-38).

In accordance with Informant's recommendation even though the panel found Respondent did not violate either Rule 1.2(a) or Rule 1.7(b) violations they recommended a suspension with no leave to apply for reinstatement for thirty days. (A55).

POINTS RELIED ON

I. THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE ATTESTED TO FACTS THAT WERE NOT TRUE.

In Re: Cupples, 979 S.W.2d 932, 937 (Mo. banc 1998)

In Re: Schiff, 542 S.W.2d 771 (Mo. banc 1976)

In Re: Wallingford, 799 S.W.2d 76,78 (Mo. banc 1990)

Matter of Smith, 749 S.W.2d 408, 413 (Mo. banc 1988)

Rule 4-8.4(c)

II. RESPONDENT DID NOT VIOLATE RULE 4-1.2(a).

In Re: Mirabile, 975 S.W.2d 936, 940 (Mo. banc 1998)

Rule 4-1.2(a)

Rule 4-1.7(b)

III. THE SUPREME COURT SHOULD ISSUE A PUBLIC REPRIMAND TO RESPONDENT FOR SIGNING THE RELEASE AND SETTLEMENT ATTESTING THAT HE EXPLAINED THE TERMS AND WAS PRESENT WHEN MR. AND MRS. PRICE SIGNED THE RELEASE AND SETTLEMENT WHEN HE DID NOT EXPLAIN THE TERMS AND WAS NOT PRESENT

WHEN THE RELEASE WAS SIGNED.

In Re: Gray, 813 S.W.2d 309 (Mo. banc 1991)

In Re: Shelhorse, IV, 147 S.W.3d 79, 81 (Mo. banc 2004)

In Re: Wallingford, 799 S.W.2d 76 (Mo. banc 1990)

Matter of Smith, 749 S.W.2d 408, 413- 414 (Mo. banc 1988)

Rule 4-8.4(c)

ARGUMENT

I. THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE ATTESTED TO FACTS THAT WERE NOT TRUE.

Respondent has always admitted that he was not present at his office on November 2, 1999. Respondent has always admitted that he did not explain the

terms of the release and settlement, nor did he see the parties sign any of the three documents left at his office for them to sign in connection with their case.

Until he received a letter from Mr. Price on March 14, 2000 he had no notice or knowledge that Mr. Price did not sign the Release and Settlement, Stipulation for Dismissal or endorse the settlement check. Until then he had no reason to expect, suspect or believe that he had not done so.

From the beginning Respondent has admitted that he left the three documents to be signed by his clients with his secretary who then gave them to the office receptionist, which was then the law office policy, when the attorney was not in the office for what was deemed to be a ministerial task of finalizing the completion of an agreed upon civil case settlement.

At every phase of this investigation, Respondent has acknowledged his

mistake. He admits that he signed the Release and Settlement document which states that he fully explained the terms and that the document strikes was signed in his presence when in fact that was not the truth.

Respondent believed that both parties had appeared in his office and signed the documents before his office staff as many previous clients had done in prior settlement cases.

Respondent admits that he should not have signed the release and settlement, but that his misrepresentation was “unintentional” and a “screw-up” on his part believing this was a routine standard release and a ministerial act of finalizing the prior agreed upon settlement of the lawsuit. (A30).

Although Respondent had never seen this particular provision previously or since in similar cases, this it not offered as an excuse for his misrepresentation. (A27). Upon cross-examination he testified as follows:

> Q: Did you sign this Page 4 of Exhibit 4, before or after the paperwork was picked up?
>
> A: It was after, once they signed it, it was put on my desk to dictate, and I dictated a letter to the court, to opposing counsel, went through, signed everything I had to sign and then sent copies of the originals out.
>
> Q: Why would you sign that fourth page of the release and settlement if it

> was not true?
>
> A: I didn’t, I wasn’t aware of any problem between my clients on this issue, this was a standard release, I had no reason to believe why they weren’t
>
> the ones who signed the document I had before me. I didn’t check their signatures at the time, I didn’t have any reason to believe why someone wouldn’t sign it, I have no reason to not trust that, and I mean, I didn’t

think that was a big deal and I was wrong. (A33).

The record may not tell us who signed Mr. Price's name but it does tell us that the Eisenstein Law Firm check was deposited into the joint account of Mr. and Mrs. Price on the same day the check was written, November 12, 1999. Mr. Price himself was aware that the check went into their joint account. (A21). Mr. Price waited until March 14, 2000 before making his first complaint to Respondent. Immediately upon receiving this letter of complaint Respondent pulled the file, talked with office personnel with whom he had left the three documents for Mr. and Mrs. Price, called Mr. and Mrs. Price and finally wrote a response to Mr. Price's letter. (A31-32). Some sixteen months later, Mr. Price filed this bar complaint against Respondent.

Respondent agrees that as an attorney he should not have signed page four of

the Release and Settlement because the facts as stated there were untrue.

Having said so, there are major differences here from the case used by Informant before the panel and this Honorable Court.

In the case of In Re: Wallingford, 799 S.W.2d 76, 78 (Mo. banc 1990), the attorney there signed the client's name, then notarized the signature falsely as that of the client and then the attorney signed a false certificate of service knowing all of those were false and then filed these documents with a court of law.

Respondent did not sign the client's name in this matter.

Respondent did not know that the client did not sign his own name in this matter.

The Release and Settlement document wrongfully attested to by Respondent unintentionally was not filed with any court.

Yet the attorney in Wallingford received a reprimand rather than a suspension.

Even Informant urged the panel that for the violation of this rule, reprimand is the appropriate sanction. Informant suggested to the panel that other alleged rule violations, which the panel found that Respondent did not violate, "up the ante to the suspension level of sanction". (A37).

Respondent did not draft the Release and Settlement document nor did he

direct the preparation of the document as in Wallingford and in the matter of In Re: Schiff, 542 S.W.2d 771, (Mo. banc 1976) where the attorney also "created evidence he knew was false." In both of these cases a public reprimand was ruled to be the appropriate sanction.

The most that can be said is that he signed page four of the document falsely but unintentionally. He certainly had constructive knowledge of the contents but such knowledge does not rise to the level of "affirmative deceit, fraud or dishonesty. Matter of Smith, 749 S.W.2d 408,413 (Mo. banc 1988).

Respondent here has always acknowledged the wrongful nature of his conduct.

There is no evidence before the panel or this Honorable Court that Respondent's false attestation was knowing or intentional. The panel did find that, Respondent knew, or should have known that Mr. Price did not sign the document. (A55). Further it found "Such inattentiveveness and misrepresentation negatively reflect and negatively impact the orderly administration of justice and his responsibilities to the general public." (A55).

While it is true, as Informant cites the Wallingford court as noting, the damage to the profession is not undone because no quantifiable "harm" resulted.

However, the fact that there was no quantifiable harm may be considered in

mitigation. In Re: Cupples, 979 S.W.2d 932,937 (Mo. banc 1998).

Also in the matter of In Re: Shelhorse IV, 147 S.W.3d 79 this Honorable Court considered the issue of quantifiable harm in determining that a reprimand is an appropriate remedy.

II. RESPONDENT DID NOT VIOLATE RULE 4-1.2(a).

After the local bar committee dismissed Mr. Price's complaint, Informant filed an information which alleged additionally that Respondent violated Rule 4-1.2(a).

Respondent has always denied this allegation.

Informant initiated an offer to Respondent for the recommendation of reprimand for three rule violations including Rule 4.1-2(a), but Respondent

continued to deny any such violation although Respondent accepted the recommendation of reprimand for his admitted violation of Rule 4-8.4(c).

After this Honorable Court rejected the recommendation, Informant again filed an information which alleged violation of Rule 4-1.2(a). After hearing evidence the panel:

> "does not find by a preponderance of the evidence that Respondent violated Rule 4-1.2(a) nor Rule 4-1.7(b) in his representation of both Mrs. Price and Mr. Price's claims for medical malpractice." (A47).

Informant attacks the panel's advisory findings because "it did not find facts contrary to the Informant's allegations and the evidence supporting them." Informant further attacks the panel's advisory findings because the panel did not

"make a finding that Respondent's version of what happened was more credible."

Informant may not know that in disciplinary proceedings Informant must prove the charges by a preponderance of the evidence. In Re Mirabile, 975 S.W.2d 936,940 (Mo. banc 1998). As in Mirabile, Informant may not meet its burden of proof merely by showing inconsistencies in the testimonies of a client and the Respondent. A charge of professional misconduct does not create a rebuttable presumption of professional misconduct.

Contrary to Informant's desire to rely only on select portions of Mr. Price's testimony, it is clear from the entire record that Mr. Price objected to Mrs. Price's abortion (A21) yet joined her in her lawsuit for his loss of consortium. His stated desire was to "run the doctor out of his practice" "ruin him". Although he says he wasn't interested in the money - he constantly provided Respondent with cases of huge six-figure awards for malpractice cases. Eventually he lowered his expectations and agrees that he authorized Respondent to settle for $60,000.

Only after Respondent conveyed the defendant's last and final offer of $50,000 does Mr. Price stand on his principle stating that upon realizing that the insurance company was paying the money - the doctor was not being punished as he desired - now "I want out of the case". (A21-22).

Respondent followed Mr. Price's request to obtain his withdrawal from the

civil case but, defendant refused, as is most common, wanting both parties to agree or there would be no settlement. So Mr. Price was confronted with the decision as to there being no settlement for $50,000, which his wife wanted badly or going along with her desire to end this litigation. He couldn't have what he wanted - a dismissal so he chose to allow his wife to settle her case and he said "it's her case, let her decide." (A23-24; A34-35). Again from Mr. Price: "I wasn't the one who suffered injuries, it had nothing ...that was between Mr. Porzenski, her and Dr. Palmer." (A40). Mr. Price's anger against the defendant/doctor and his

wife who went against his wishes in obtaining the abortion as well as his tirade against abortion are all clear in his testimony and were duly observed and noted by the panel members.

As the panel found on page 6 of 16:

> "Mr. Price abhorrence to the concept of abortion was obviously a substantial issue of underlying disparity between Mr. and Mrs. Price but same was not communicated to Respondent by Mr. Price prior to the discussions that occurred at the settlement conferences....." (A46)

Informant would have this Court accept only Mr. Price's testimony that after

defendant's gave their last and final offer of $50,000 he "wanted his name removed", "wanted out of the case", that he never retracted that instruction, and that he learned subsequently, to his mortification, that Respondent had done nothing to remove him as a party. (Informant's Brief, p 20).

The panel however heard testimony from both Mr. Price and Respondent.

Mr. Price admitted that Respondent informed him that he tried to get the defendant in the case to allow Mr. Price to withdraw, but the insurance company would not allow Mr. Price to withdraw:

> "...the other attorney said no, the case was getting

fully resolved today, everybody is being dismissed

or nobody is being dismissed." (A28).

Respondent testified consistently before the panel that after going back to Mr. & Mrs. Price telling them both that the proposed settlement was a package deal and "you have to be both part of the settlement" or there would be no settlement for Mrs. Price. Whereupon Mr. Price said "that's fine, it's her decision anyhow" (A23). Again, Mr. Price said "fine, that's her case anyhow." (A24).

On cross-examination, again the same testimony: "I went as he directed me, as an attorney, and told the other side, I came back and told him we couldn't do

that, if he still wanted that, there would be no settlement today for his wife, he told me that's fine I'll stay in and get the case done", (A35) and again, "this is my wife's case, get it done." (A36).

Respondent's testimony is supported in part by Mr. Price when he told the panel: "I told Elaine that basically that's between Mr. Porzenski, herself and Dr. Palmer, and I walked out of the conference room." (A39). "I wasn't the one who suffered the injuries, it had nothing...that was between Mr. Porzenski, her and Dr. Palmer." (A40).

Mr. Price testified he "was fed up with the process", he "didn't want any

more to do with it," "did not want to pursue his consortium claim - separately or independently." (A29).

Lastly, Respondent testified throughout his testimony, cross-examination and questions by the panel, as well as earlier before the local committee that upon learning from Respondent that he could not withdraw from the case, Mr. Price agreed to "get the case done" (A35), "that it was his wife's case and that was her decision." (A35).

Informant would have this Court reject the panel's finding:

> "As a result, the Panel does not find by a preponderance of the evidence, that Respondent violated Rule 4-1.2(a) nor Rule 4-1.7(b)

> in his representation of both Mr. and Mrs. Price's claims for medical malpractice."

The panel did indeed find facts contrary to Informant's argument regarding Mr. Price's testimony and Respondent's testimony. (A51-52).

> "S. Respondent conveyed the division that was presented to him between Mr. Price's position and Mrs. Price's position to defense counsel, who indicated to Respondent that it was a package deal and a joint dismissal would be required by both parties. (A23).
>
> "T...Respodnent was clear that Mr. Price's position was that it

> was Mrs. Price's decision and that Mr. Price viewed the matter that the ultimate decision was pretty much Mrs. Price's and that Respondent advised Mr. Price that the settlement would require that he - Mr. Price could not be dismissed out "today" if the settlement were to be effected. (A23-25).

The panel who heard all of the testimony was in the best position to determine the credibility of the two witnesses and thus found that Respondent did not violate Rule 4-1.2(a) because Mr. Price subsequently withdrew his request to be dismissed out so that his wife could finalize her settlement and there could be no

settlement if he persisted in his request to be dismissed.

> "Mr. Price did express his disdain for the underlying procedure having been performed in the first instance, but determined and advised Respondent that the decision for settlement was pretty much in Mrs. Price's court of combat". (A47).

Respondent agrees that the panel was obligated to hear and decide this case on the Information but the Information is not proof in and of itself nor does it create any inference that Respondent violated this rule.

Informant's opinion that the panel "may have been reaching for answers to questions not raised by the information" is both unsubstantiated and speculative at best.

The panel did hear the evidence and did decide the case upon the evidence presented and contrary to Informant's opinion, found that Respondent did not violate Rule 4-1.2.

The panel's decision is advisory and this Honorable Court reviews the evidence de novo and determines independently the credibility, weight and value of the testimony of the witnesses, determines the facts and draws its own conclusions of law.

Nonetheless it is also true that the panel's findings are helpful to this Court.

Mirabile, supra at 941.

The panel's finding is that the evidence here did not support Informant's alleged rule violation, their opinion, notwithstanding.

Respondent has here explained Mr. Price's change of mind of wanting to be dismissed out when there could be no such dismissal and the settlement that Mrs. Price wanted to accept.

Respondent testified consistently and adamantly that Mr. Price gave his consent and permission for Respondent to proceed with his wife's desire to accept and finalize the settlement.

Contrary to Informant's opinion of the evidence, the panel found that Informant's evidence was wanting or lacking in that it found by a preponderance of the evidence that Respondent did not violate Rule 4-1.2(a).

Informant's evidence not only did not overcome the burden of proof required, it also did not overcome the clear and consistent evidence of Respondent, which the panel chose to accept over Mr. Price's testimony.

Informant seeks to have this Honorable Court accept only Mr. Price's testimony and reject the panel findings and Respondent's testimony. But once again, this Court has previously ruled that Informant may not meet its burden of proof merely by showing inconsistencies in the testimonies of a client and the

Respondent. In Re Mirabile, supra.

III. THE SUPREME COURT SHOULD ISSUE A PUBLIC REPRIMAND TO RESPONDENT FOR SIGNING THE RELEASE AND SETTLEMENT ATTESTING THAT HE EXPLAINED THE TERMS AND THAT HE WAS PRESENT WHEN MR. AND MRS. PRICE SIGNED THE RELEASE AND SETTLEMENT WHEN HE DID NOT EXPLAIN THE TERMS AND WAS NOT PRESENT WHEN THE RELEASE WAS SIGNED.

That Respondent violated Rule 4-8.4(c) is not the issue. Respondent has consistently admitted that he did so. That Respondent's conduct for that violation deserves a sanction is also not the issue. The parties agree that his misconduct is deserving of sanction.

What is the issue, here, is the appropriate level of sanction for this rule violation.

This is the same case it was the on October 31, 2003 with less rule violations having been proven, but nonetheless alleged by Informant.

On October 31, 2003 Informant initiated a stipulation in return for the recommendation of a public reprimand. (A3).

On October 31, 2003, Informant alleged three rule violations even though Respondent admitted to only one and Informant then sought a public reprimand as "the appropriate sanction". (A3-14).

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On September 9, 2004, counsel argued before the panel "that at the minimum we have here a public reprimand." She then agreed that because of the two additional alleged rule violations (for which the panel concluded that Respondent did not violate) "up the ante to the suspension level". Even then faced with three alleged rule violations she asked for "shorter than six months suspension" with the right to reapply after thirty days.

The posture of this case is substantially less than that which was laid out by Informant in its stipulation before this Honorable Court of two additional alleged rule violations to which the Respondent did not agree with and which the panel has not found. Thus the posture of this single violation should not exceed that which was originally initiated and proposed.

Now we are looking at only the one rule violation - that Respondent has always admitted yet now Informant is seeking the much more serious sanction of six months suspension without leave to reapply for six months.

What was the appropriate sanction for two additional alleged but unproven violations than we have here has now been "upped" multiple times over for only one of those same violations.

While Informant is not limited to asking for a public reprimand is admitted but there should be some reasonable basis for such an extreme "upping of the ante".

Even though Informant is not bound by their recommendation of what Informant then believed to be "the appropriate sanction" (paragraph 3, Motion for Leave to File Information and Stipulation directly in the Supreme Court, December 12, 2003) for three alleged rule violation as opposed to the one as here and now, there is no reasonable basis or new evidence for this much harsher recommendation under the same facts as two years ago. (A10-11).

Six months suspension without leave to apply for reinstatement for six months is much like the death sentence for a young single practitioner whose law office operation will surely die and wither away. A wife and four young children will have no source of income for many months even over and above the recommended six months suspension before final re-application and readmittance and restarting an entire new office practice. "Interruption of his practice at this

stage would harm not only the Respondent and his family but also his clients and the courts." In Re Shelhorse IV., 147 S.W.3d 79, 81 (Mo. banc 2004).

This Honorable Court's review of Informant's motion for leave to file Information and the proposed Information filed in this Honorable Court on December 12, 2004 will readily see that no additional facts or circumstances have been added since that time - two years ago.

In fact, two alleged rule violations have not been proven as Respondent has

said all along, when Informant initiated the reprimand sanction.

While Respondent did falsely acknowledge on page four of the release and settlement document that he explained the terms and that Mr. & Mrs. Price signed in his presence this document was not to be and was not filed with any court.

This is the only document of the three that was acknowledged to be signed in Respondent's presence.

The stipulation for dismissal and the settlement check, which both purports to bear Mr. Price's signature, were not signed in Respondent's presence and he never acknowledged that they were. Nor is there any evidence whatsoever that Respondent knew that Mr. Price did not sign the three documents.

The panel found that Respondent followed his law firm's office procedure upon receipt of the settlement check, Respondent is not aware of who placed Mr.

Price's signature on the documents, and the check that was deposited into the joint account of Mr. & Mrs. Price. (A52). Mr. Price testified he knew that the check had "came in with my name on the check, which I refused to sign." (A21), but he did not notify Respondent that he wouldn't and/or didn't sign the check until some four months after the check was deposited in the joint account of Mr. & Mrs. Price of which he was aware. (A21).

The panel further found that Respondent only saw the three documents with

both signatures affixed. That the false acknowledgment was "not deliberate" according to Respondent but rather "neglect" and that Respondent has since revised his own office procedures in order to avoid further similar mistakes. (A52).

That he knew or should have known that Mr. Price did not in fact sign the document is a finding of neglect due to inattentiveness and not one of intentional deliberate deceit or dishonesty. Matter of Smith, 749 S.W.2d, 408, 413- 414 (Mo. banc 1988). As in Smith, the most that can be said here is that Respondent signed page four falsely but unintentionally. He had constructive knowledge but this does not rise to the level of affirmative deceit, fraud or dishonesty. As previously noted this Honorable Court has previously considered the following issues in similar cases:

Respondent did not draft the document.

Respondent did not sign Mr. Price's name.

Respondent did not know that Mr. Price

didn't sign even though he should have known

and would have known had he required the

parties to sign in his presence.

Informant urges "that Respondent had a dishonest or selfish motive desire to settle contingent fee case notwithstanding client's last minute balk".Such is not the

findings of the panel, is speculative and without basis in the evidence, or the facts. Such was not proven by a preponderance of the evidence and is only the unfounded opinion of the Informant.

Respondent has cooperated with the local bar committee, and the panel and the Informant and has always acknowledged the wrongful nature of his conduct.

For more serious violations of the same rule resulting in a reprimand see In Re: Wallingford, 799 S.W.2d 76, 78 (Mo. banc 1990) where the attorney there signed the client's name, notarized that signature falsely as the client's then signed a false certificate of service knowing it to be false and filed it with the court.

Also In Re: Gray, 813 S.W.2d 309, (Mo. banc 1991) where the attorney lied about the filing of the petition, later did file petition along with statistical information form, statement of income and expenses form and a statement of property form - all three purportedly signed by the client when client did not sign them and all notarized as being signed by the client in the presence of the attorney

when said was known to be false by the attorney. The appropriate sanction was a reprimand.

Also, In Re Schiff, 542 S.W.2d 771 (Mo. banc 1996) where the attorney "created evidence he knew was false."

Lastly, Respondent's only prior sanction imposed upon him in 1998 for

failure to appear for several docket calls should not "up the ante to a suspension". Respondent's prior sanction was known when Informant initiated and sought a joint resolution with a reprimand for three alleged rule violations. Respondent learned his lesson back then and has not repeated that behavior.

The public and the bar will be served with the initial recommendation of a reprimand and the Respondent has acknowledged his misconduct, learned his lesson, and taken the appropriate and necessary steps to assure his misconduct will not be repeated.

CONCLUSION

Respondent has admitted and agreed that he violated Rule 4-8.4(c) in that he attested in the Release and Settlement document that he explained to the parties the terms therein and that he witnessed their signatures when in fact he had not done so.

There has not been a showing by the preponderance of the evidence, that Respondent violated Rule 4-1.2(a).

Respondent still believes and recommends that the earlier joint recommendation of a public reprimand is the “appropriate sanction” which will best serve the public, bar and the administration of justice.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2006, two copies of Respondent's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to: Ms. Sharon K. Weedin, Staff Counsel, 3335 American Avenue, Jefferson City, Mo. 65109.

_____
Donald L. Wolff (#18008)
Attorney for Respondent

Certification: Rule 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03:

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 6,110 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that is it virus free.

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